Supreme Court, U. S.
FILED
OCT 15 1980
MICHAEL RODAK, JR., CLERK

80-611

No. ____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

MATTHEW CIANCIULLI, JR.

and

JOSEPH R. RICCA,

Petitioners

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Spencer M. Wertheimer
Helen T. M. McCaffrey
Andrew Jackson
Counsel for Petitioners

2132 Grant Avenue
Philadelphia, Pennsylvania 19115
(215) 698-8648
(215) 665-9696

804 Land Title Building
Broad and Chestnut Streets
Philadelphia, Pennsylvania 19110

THE LEGAL INTELLIGENCER, 66 NORTH JUNIPER STREET, PHILA., PA. 19107 (215) 561-4050

QUESTIONS PRESENTED

The questions presented here are:

1. Were the Petitioners denied their rights to due process of law and their right of confrontation as guaranteed by the Fifth and Sixth Amendments to the Constitution of the United States by the Trial Court's Abuse of Discretion in restricting cross examination of the Government's expert witness and in excluding Petitioners' proffered expert witness testimony?

2. Did the Court of Appeals err in affirming the district court's decision to withhold information regarding a tainted alternate juror, prior to her being seated as a regular, render the Petitioners trial fundamentally unfair and deprive them of due process of law, in violation of the Fifth and Sixth Amendments, United States Constitution?

3. Did the Court of Appeals err in affirming the district court's expansive interpretation of prosecutorial statements, concerning Petitioners "stone-walling", deprive Petitioners' of the full protection of the Fifth Amendment, United States Constitution and render Petitioners' trial fundamentally unfair?

TABLE OF CONTENTS

	Page
Opinions Below	2
Jurisdiction	2
Constitutional and Statutory Provisions Involved	2
Statement of the Case	4
1. History Before the District Court	4
2. The Judgment of the Court of Appeals	6
Reasons for Granting the Writ	6
I. The lower court has decided an important question, regarding the application of Federal Law which has not been but should be, settled by this Court and has placed it in conflict with other Federal Courts of Appeal, specifically United States vs. Garvin and United States vs. Dellinger	6
II. The Court below disregarded controlling decisions of this Court and denied Petitioners the full protection and benefit of their Fifth and Sixth Amendment rights	9
III. The lower court has disregarded controlling decisions of this Court on an important question of constitutional law, specifically Griffin vs. State of California	10
Conclusion	12
Appendix	
Supplemental Printing	A1-A93

TABLE OF CITATIONS

Cases Cited: Page

Davis v. Alaska,
415 U.S. 308 (1974) 8

Griffin v. State of California,
380 U.S. 609, 85 S. Ct. 1229 (1965) 10

Holmgren v. Massey-Ferguson Inc.,
516 F.2d 856 (1975) 8

Patterson v. People of State of Colorado,
205 U.S. 454, 27 S. Ct. 556 9

Remmer v. United States,
347 U.S. 227, 74 S. Ct. 450 (1954) 9

United States v. Chaney,
446 F.2d 571, Cert. denied 404 U.S. 933 992 S. Ct. 543 (1971) 11

United States v. Dellinger,
472 F.2d 340 (7th Cir. 1972) 7

United States v. Garvin,
565 F.2d 519 (1977) 8th Cir. 7

Wilson v. United States,
149 U.S. 60, 13 S. Ct. 765 (1893) 10

Statutes Cited:

42 U.S.C. 1973 ..... 3, 4, 6
18 U.S.C. 241 ..... 3, 4
28 U.S.C. 1254 2
25 P.S. 2814 6

United States Constitution Cited
Fifth Amendment 2, 9, 10, 11, 12
Sixth Amendment 3, 9, 12

Rules Cited
Federal Rule of Evidence 702 ..... 4, 7
Federal Rule of Evidence 402 ..... 4, 7

TABLE OF CITATIONS *(Continued)*

Statutes: Page

Reports; Publications:
Slough "Testamentary Capacity Evidentiary Aspects" 36 Texas Law Review 1 (1953) . . 8

No. ____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

MATTHEW CIANCIULLI, JR.

and

JOSEPH R. RICCA,

Petitioners

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners, Matthew Cianciulli, Jr. and Joseph R. Ricca, pray that a Writ of Certiorari issue to review the Judgment Order of the Court of Appeals for the Third Circuit rendered in these proceedings of July 1, 1980.

OPINIONS BELOW

The United States District Court for the Eastern District of Pennsylvania by Opinion and Order dated October 23, 1979, denied Petitioners' post-verdict motions. The Opinion and Order of the district court are printed at Appendix A, infra at pages 1 through 86.

JURISDICTION

On July 1, 1980 the Court of Appeals for the Third Circuit entered a judgment order affirming the district Court's holding. On July 15, 1980 Petitioners filed a Petition for Rehearing which was denied on July 29, 1980. On July 29, 1980, August 20, 1980 and September 17, 1980 Petitioners filed Motions for Stay of Mandate pending Application to this Court for a Writ of Certiorari which the Court of Appeals granted by Orders dated August 13, 1980, August 27, 1980 and September 23, 1980, and which are printed at Appendices infra at pages 89 through 93.

This honorable Court granted Petitioner an extension of time until October 15, 1980 in which to file the Petition, said order appearing in the Appendix, infra at page 92. The Jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth and Sixth Amendments to the United States Constitution which provide in relevant part:

> "Fifth Amendment: No person shall be . . . deprived of life, liberty or property, without due process of law . . .

Sixth Amendment: In all criminal, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . and have the Assistance of Counsel for his defense."

This case involves §1973 (i) (c) of Title 42, United States Code, which provides as follows:

(c) Whoever knowingly or willfully gives false information as to his name, address, or period of residence in the voting district for the purpose of establishing his eligibility to register or vote, or conspires with another individual for the purpose of encouraging his false registration to vote or illegal voting, or pays or offers to pay or accepts payment either for registration to vote or for voting shall be fined not more than $10,000 or imprisoned not more than five years, or both: Provided, however, That this provision shall be applicable only to general, special, or primary elections held solely or in part for the purpose of selecting or electing any candidate for the office of President, Vice President, presidential elector, Member of the United States Senate, Member of the United States House of Representatives, Delegate from the District of Columbia, or Resident Commissioner of the Commonwealth of Puerto Rico.

This case, as well, involves Section 241 of Title 18, United States Code, which provides as follows:

Conspiracy against rights of citizens

If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or

They shall be fined not more than $10,000 or imprisoned not more than ten years, or both; and if

death results, they shall be subject to imprisonment for any term of years or for life.

This case, as well indicates Federal Rules of Evidence Number 702 and 402 which provides as follows:

> Federal Rule of Evidence 702
> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience training or education may testify thereto in the form of an opinion or otherwise.

> Federal Rule of Evidence 402
> All relevant evidence is admissable.

STATEMENT OF THE CASE

1. History Before the District Court

On September 24, 1980, Petitioners Matthew Cianciulli, Jr. was convicted of one count of conspiring to provide false voter registration information under Title 42, U.S.C. Section 1973 (i) (c), one count of conspiring to violate the civil rights and privileges of citizens, under Title 18 U.S.C. Section 241, and nine counts of aiding and abetting the false registration of voters, under Title 42, United States Code Section 1973 (i) (c).

Petitioner Joseph R. Ricca was convicted of one count of conspiring to violate the civil rights and privileges of citizens, under Title 18 U.S.C. Sec. 241 and three counts of aiding and abetting the false registration of voters, under Title 42 United States Code Section 1973 (i) (c).

The indictment contained fifty (50) predicated acts alleging that Petitioners conspired to encourage false registration, gave false information for the purpose of establishing eligiblity register, committed mail fraud and conspired to injure citizens in the exercise of Constitu-

tional rights. Distilled to its essence, Petitioners were convicted of aiding nine voters to falsely register.

The evidence established that between March, 1974 and September, 1976, fifty-five (55) individuals who were registered to vote from nine addresses within the First Ward, Thirteenth Division, while having a connection of some kind with these addresses, had not lived there on either a permanent or exclusive basis.

As part of its case the government called Joseph Migatz the Administrator of the Voter Registration Division of the Philadelphia City Commissioner's Office, who testified as an expert witness regarding residency and voter eligibility under the Pennsylvania Constitution.

Petitioners' counsel was denied an Offer of Proof prior to his taking the stand. In addition when the defendants' attempted to rebutt this expert testimony with their own expert, from the Voting Commission, the Court would not permit it.

The Court's denial of the defense Motion for an Offer of Proof, the admission of clearly rank, uncontradicted opinion of a government expert and its denial of a defense motion to present a rebuttal expert, denied defendants their Fifth and Sixth Amendment rights to confrontation cross-examination and effective assistance of counsel.

During the Petitioners trial outside contact was made with an alternate juror. Although known to the Court, this information was not disclosed to Petitioners' counsel prior to this alternate being seated as a regular.

Motions for a mistrial arising out of this incident and the Court's clear abuse of its discretion which denied defendants their Fifth Amendment rights were denied.

In his summation to the jury the government prosecutor referred to the evidence against the defendants as "uncontradicted" and stated that the defendants "stonewalling" had continued throughout the trial. A re-

mark which had to call attention to the defendants failure to take the stand Defense Motions for a mistrail were denied thereby depriving defendants of their Fifth Amendment Rights.

2. *The Judgment of the Court of Appeals*

On July 1, 1980, a panel of the Court of Appeals for the Third Circuit affirmed Petitioners' conviction by Judgment Order. (Appendix 87)

REASONS FOR GRANTING THE WRIT

I.

The lower court has decided an important question, regarding the application of Federal Law which has not been, but should be, settled by this Court and has placed it in conflict with other Federal Courts of Appeal, specifically United States v. Garvin and United States v. Dellinger.

During petitioners' trial the government presented the expert testimony of Joseph Migatz, the Administrator of the Philadelphia Voting Commission. In his testimony he gave the definition of "residence" based upon his interpretation of the Pennsylvania Constitution. It was a single sentence definition, notwithstanding the fact that the legislature and Courts of Pennsylvania have spent considerable time and litigation in attempting to define residence.[1]

The trial judge himself stated that the concept of residency as used in 42 Sec 1973 (i) (c) "turned upon the construction of Pennsylvania statutory and decisional law on residency."[2]

---

1. Pennsylvania legislature has provided in Section 2814 of the Pennsylvania Election Law Title 25, seven rules to be followed in determining the residency of a person.

2. Trial Court's Memorandum Opinion Appendix, p.68.

When petitioners attempted to introduce the expert rebuttal testimony of the solicitor and Deputy Commissioner to the Philadelphia Voting Commission, Michael McAllister, Esquire, to enunciate the policy, with regard to residency, of the Philadelphia Voting Commission, they were stopped.

Rule 402 of the F.R. Ev. states that "All relevant evidence is admissable." Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probably or less probable than it would be without the evidence."

Rule 702 of the F.R. of Ev. provides for the admission of expert testimony that will be helpful to the trier of fact.

The 8th Circuit Court of Appeals in *United States v. Garvin*, 565 F.2d 519 (1977) stated that:

> "(defendant) in presenting his good faith defense, be permitted to submit evidence of the other policies introduced against him and of his lack of intent to defraud."

That case held that in the interpretation of the meaning of language on forms for insurance policies, the layman can use the help of an expert.

Similarly, the 7th Circuit in *United States v. Dellinger*, 472 F.2d 340 ruled that testimony of witnesses called as experts was relevant to a crucial element in the proof of the government's case and to exclude it was an abuse of discretion.

In the present case terminology, i.e. the meaning of a word — "residence" is a critical fact in the government case. The Court by permitting only the government witnesses definition presents an uncontradicted and unbalanced view to the ultimate prejudice of and harm of the defendants.

The damaging expert testimony had already been heard by the trier of fact, from the prosecution witness

Mr. Migatz; the trial Court in prohibiting the testimony of the defense expert tipped the balance unfairly[3] and was manifestly erroneous and a clear abuse of discretion. *Holmgren v. Massey-Ferguson, Inc.*, 516 F.2d 856 (1975).

This lack of judicial evenhandedness places in serious jeopardy the question of defendant's right to due process and the effective assistance of counsel balanced against the discretion of the trial court as to the admission or exclusion of expert testimony. There is needed more meaningful criteria to determine the boundaries of judicial discretion.

In the present case and as part of the same (evidentiary) circumstances the lower court admitted the expert testimony of Mr. Migatz after denying a defense motion for an Offer of Proof.

The unfettered right to complete an intelligent cross-examination of government witnesses is a crucial and minimum ingredient of a fair trial.

In *Davis v. Alaska*, 415 U.S. 308, 318 (1974) this Court stated that the denial of "the right to effective cross-examination . . . should be constitutional error of the first magnitude and no amount of showing of want or prejudice would cure it."

By denying defense counsel Motion for an Offer of Proof, even as to the witnesses qualifications, the lower court seriously crippled defense counsel's ability to ef-

---

3. SLOUGH "TESTAMENTARY CAPACITY EVIDENTIARY ASPECTS" 36 Tex. L. Rev. 1, 11-12.

"It is a curious turn of mind that impels a judge to mistrust the ability of the juror to assay the opinion of an expert and simultaneously gives the same juror undeserved credit with respect to comprehension of an abstract, complex instruction. The reason behind the rule assumes that the jury will accept all opinions uttered at fact value, overlooking the fact that the jurors have free rein under most circumstances to discount testimony presented for their consumption. In addition, it appears to discount the value of cross examination implying that expert opinion is beyond the pale of contradiction."

fectively cross-examine the government expert witness and thereby denied the defendants their Sixth Amendment rights of effective assistance of counsel.

II.

The Court below disregarded controlling decisions of this Court and denied Petitioners the full protection and benefit of their Fifth and Sixth Amendment rights.

> "The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in an open court and not by any outside influence, whether of private talk or public print."

Thus stated this Court in *Patterson v. People of State of Colorado*, 205 U.S. 454, 27 S.Ct. 556, 558.

During Petitioner's trial an alternate female juror had an inocuous, although to her, disturbing, private contact with the brother of a defendant. After discussing it with her fiance, she reported it to the trial judge, who did not inform counsel but immediately called in the F.B.I. to investigate.

A few days later, a regular juror was absent and the Judge, while withholding this information, asked counsel if the alternate should be seated. Counsel agreed, being uninformed of the possible taint of the alternate juror. Upon learning this critical fact, Motions for a mistrial were made and all denied.

The trial court's failure to remove this juror or at the very minimum, to inform counsel prior to her seating of the private communication and F.B.I. Investigation, amounts to an abuse of judicial discretion and denies Petitioners their Fifth Amendment Rights.

The approach discussed by this Court in *Remmer v. United States*, 347 U.S. 227, 74 S. Ct. 450 is that:

> "Any private communication, contact or tampering, directly or indirectly with a juror during a

> trial about the matter pending before the jury is, for obvious reasons deemed presumptively prejudicial if not made in pursuance of known rules of the courts and the instructions and directions of the Court made during the trial, with full knowledge of the parties."

Instead, the trial court, who thought the incident important enough to warrant an F.B.I. investigation but not important enough to inform counsel, distorted the guidelines set forth by this Court in Remmer v. United States, supra. which denied Petitioners their Fifth Amendment right to due process of law.

III.

The lower court has disregarded controlling decisions of this court on an important question of constitutional law, specifically Griffin v. State of California.

Petitioners' case represents prosecutorial misconduct in its purest form i.e. comment during the summation on the defendants' failure to testify on their own behalf.

This Court condemned such conduct over eighty-five years ago in federal criminal cases, in *Wilson v. United States*, 149 U.S. 60,13 S. Ct 765 (1983) and more recently in *Griffin v. State of California*, 380 U.S. 609, 85 S. Ct. 1229 (1965).

In Griffin, supra, this Court stated:

> "Comment on the refusal to testify is a remnant of the inquisatorial system of criminal justice which the Fifth Amendment outlaws".

Given the atmosphere of the post Watergate era, the term "stonewalling" has come to mean remaining silent in common parlance. By not immediately issuing a curative instruction or granting defense motions for a mis-

trial, the lower Court ignored the test enunciated by the Third Circuit Court of Appeals in *United States v. Chaney*, 446 F. 2d 571, cert denied 404 U.S. 993, 992 S. Ct. 543. The Court stated:

> "The test for determining whether a remark constitutes an improper comment on an accused's failure to take the stand in his own behalf is whether the language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify".

The Fifth Amendment protection against self incrimination is so central to the integrity of the criminal justice process under our system that the way in which this problem is avoided is by requiring absolute silence by the prosecution on the defendant's failure to speak on his own behalf.

To make the harm to defendants even more egregious, the damaging remark was made by the prosecutor during his rebuttal argument. The defendants were left with no protection from either the lower Court, which refused all motions for mistrial and failed to give a curative instruction, or their own counsel, who were precluded from speaking again.

CONCLUSION

The lower Court's ruling as to the admission of expert testimony, the seating of a juror without prior notice to counsel, of private communication between her and a defense relative and its failure to grant a mistrial or give a curative instruction after improper prosecutional statements were in violation of controlling decisions of this Court, accompanied by the denial of defendants Fifth and Sixth Amendment rights, respectfully warrant that the Petition for Certiorari be granted to review the judgment of the Court of Appeals for the Third Circuit.

Respectfully submitted,

Helen T. M. McCaffrey
Spencer M. Wertheimer
Andrew Jackson

Counsel for Petitioners,
MATTHEW CIANCIULLI JR. and
JOSEPH R. RICCA